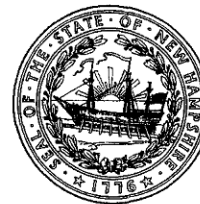




The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

E. Bruce Lyskawa, Sr.
271 Derry Road
Litchfield, NH 03052

Re: 30 King Street, Auburn, NH
AST #0000053

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
No. AF 05-010**

January 26, 2005

I. INTRODUCTION

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Waste Management Division ("the Division") to E. Bruce Lyskawa, Sr., pursuant to RSA 149-M and Env-C 601. The Division is proposing that fines totaling \$2,000 be imposed against E. Bruce Lyskawa, Sr., for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Waste Management Division, is an administrative agency of the State of New Hampshire having its principal office at 29 Hazen Drive, Concord, NH 03302.
2. E. Bruce Lyskawa, Sr., in an individual having a mailing address of 271 Derry Road, Litchfield, NH 03052.

III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS

1. RSA 146-A authorizes DES to minimize contamination of the waters and land of the state due to improper storage and handling of petroleum by establishing requirements for the operation of aboveground petroleum storage facilities ("AST"). Pursuant to RSA 146-A:11-c, the Commissioner of DES has adopted NH Admin. Rules Env-Wm 1402 to establish requirements for the registration, design, installation, operation, maintenance, and monitoring of above-ground petroleum storage facilities.
2. RSA 146-A:15 authorizes the Commissioner of DES to impose administrative fines of up to \$2,000 per offense upon any person who violates any provision of RSA 146-A or any rule adopted under the provisions of this chapter. Pursuant to RSA 146-A:15, the Commissioner has adopted Env-C 607 to establish the schedule of fines for such violations.
3. E. Bruce Lyskawa is the owner of one 6,000-gallon diesel AST, located at 30 King Street, Auburn, New Hampshire ("the Property"), and further identified by the DES site number 200205023 and the AST identification number 0000053 ("the Facility").

4. The AST system at the Facility is subject to the requirements of RSA 146-A and Env-Wm 1402.
5. On or about March 28, 2003, Mr. Lyskawa purchased the AST described in paragraph 3 from First Student, Inc.
6. On or about April 1, 2003, First Student, Inc. notified DES of the sale.
7. On April 3, 2003, the Division notified Mr. Lyskawa by letter sent via Certified Mail that an amended registration form must be submitted within 30 days of the transfer of AST ownership. The Division enclosed a registration form for that purpose. The letter was returned unclaimed.
8. On April 28, 2003, the Division contacted Mr. Lyskawa by telephone to discuss the amended AST registration requirement. On April 29, 2003, the Division sent Mr. Lyskawa a copy of the April 3, 2003 letter and a registration form via facsimile.
9. On July 16, 2003, the Division notified Mr. Lyskawa by letter via Certified Mail of the requirement to submit an amended AST registration form.
10. Mr. Lyskawa has failed to submit an amended AST registration form.
11. Env-WM 1402.05 requires an owner to register an AST facility with DES.
12. Env-Wm 1402.07 requires the new owner of an existing AST facility to file an amended registration form with DES no later than 30-days after the transfer.

IV. VIOLATIONS ALLEGED AND PROPOSED ADMINISTRATIVE FINES

1. Mr. Lyskawa has violated Env-Wm 1402:05 by failing to comply with registration requirements. For this violation, Env-C 615.02(a) specifies a fine of \$1,500.
2. Mr. Lyskawa has violated Env-Wm 1402.07 by failing to file an amended registration form for the 6,000-gallon diesel AST. For this violation, Env-C 615.02(e) specifies a fine of \$500.

The total fine being sought is \$2,000.

V. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING

Pursuant to Env-C 601.06, E. Bruce Lyskawa is required to respond to this notice. Please respond no later than February 28, 2005 using the enclosed colored form.

1. If you would like to have a hearing, please sign the appearance section of the colored form (upper portion) and return it to the DES Legal Unit, as noted on the form.
2. If you choose to waive the hearing and pay the proposed fine, please have an authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.

3. If you wish to discuss the possibility of settling the case, please have an authorized representative sign the appearance and return it to the DES Legal Unit **and** call the DES Legal Unit to indicate your interest in settling.

You are not required to be represented by an attorney. If you choose to be represented by an attorney, the attorney must file an appearance and comply with NH Admin. Rule Env-C 200.

VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that you committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that you committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:


* Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that you prove, by a preponderance of the evidence, applies in this case:**

1. The violation was a one-time or non-continuing violation, **and** that you did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** that you did not benefit financially, whether directly or indirectly, from the violation.
2. At the time the violation was committed, you were making a good faith effort to comply with the requirement that was violated.
3. You have no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to your case which was not known to the Division at the time the fine was proposed.

*******IMPORTANT NOTICE*******

An administrative fine hearing is a formal hearing. All hearings will be recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that you committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is your opportunity to present testimony and evidence that you did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If you have any evidence, such as photographs, business records or other documents, that you believe show you did not commit the violation(s) or that otherwise support your position, you should bring the evidence to the hearing. You may also bring witnesses (other people) to the hearing to testify on your behalf.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.des.nh.gov). If you have any questions about this matter, please contact the DES Legal Unit, at (603) 271-6072.

COPY

Anthony P. Giunta, P.G.
Director
Waste Management Division

Enclosure (NHDES Fact Sheet #CO-2002)

cc: Michael J. Walls, DES Assistant Commissioner
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB
Kerry D. Barnsley, Compliance Attorney, DES Legal Unit
Public Information Officer, DES PIP Office
Lynn A. Woodard, P.E., WMD UST Supervisor
Mike Juranty, DES WMD
Mark Antonia, WMD

***** RETURN THIS PAGE ONLY *****

**E. BRUCE LYSKAWA IS REQUIRED BY LAW
TO RESPOND TO THIS NOTICE.**

PLEASE RESPOND NO LATER THAN February 28, 2005

Please check the appropriate line and fill in the requested information below.

APPEARANCE On behalf of E. Bruce Lyskawa

_____ I request to have a **formal hearing** scheduled in this matter.

_____ I would like to **meet informally** to discuss the issues in this matter.

WAIVER OF HEARING On behalf of E. Bruce Lyskawa

_____ I certify that I understand the right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. The fine payment in the amount of \$2,000 paid to "Treasurer, State of New Hampshire" is enclosed.*

** If payment is made by a check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*

Pursuant to Env-C 203.05 please provide the following information:

Signature

Date

Name (please print or type): _____

Title: _____

Phone: _____

RETURN THIS PAGE ONLY TO:

Department of Environmental Services ~ Legal Unit

Attn: Michael Sclafani, Legal Assistant

P.O. Box 95

Concord, NH 03302-0095

ENVIRONMENTAL Fact Sheet



29 Hazen Drive, Concord, New Hampshire 03301 • (603) 271-3503 • www.des.nh.gov

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Administrative Fines of the Department of Environmental Services

The Commissioner of the Department of Environmental Services (DES) is authorized by several statutes to impose administrative fines for certain violations of those statutes. In order to implement this authority, the Commissioner has adopted rules which specify the procedures for notifying people that a fine is being proposed and which specify the fine amount for any given violation. These rules are identified as Chapter Env-C 600.

Administrative fine proceedings follow a defined path. The first step is for a Division of DES to issue a Notice of Proposed Fine. The Notice will inform you of the violations the Division believes you have committed, together with the dollar amount of the fine that is being proposed. At this point, a final decision as to whether to impose the fine **has not been made** ... the Notice simply initiates the proceeding. The Notice will also inform you that you have a right to have a hearing before a final decision will be made, and may give a date and time for the hearing.

The Notice you receive will have a page attached to it on which you can indicate whether you will attend a hearing or whether you are waiving your right to a hearing and paying the fine which has been proposed. **YOU MUST COMPLETE AND RETURN THIS FORM.** The worst thing you can do if you receive a Notice is to ignore it! Under the rules which have been adopted, the case can proceed even if you don't respond. In order to achieve the best result, you must participate in the process.

When you receive a Notice of Proposed Fine, if you are interested in trying to settle the case without going to a formal hearing you should contact the person identified in the Notice. Many fine cases are settled in this way, often with a lower fine, a payment schedule, and/or a suspended fine. The negotiations need to start soon after the Notice is received, though. Don't wait until the day scheduled for the hearing to ask about settling the case.

If the case proceeds to a hearing, the Commissioner will designate a person to serve as a hearing officer to preside at the formal hearing. The hearing officer will not have prior knowledge of the Division's allegations, and will be neutral insofar as the outcome of the case is concerned. At the hearing, the Division will be required to prove that the violation(s) occurred and that the proposed fine is warranted. You will have an opportunity to ask questions of (cross-examine) the Division staff, and also present your own evidence, including testimony of witnesses if you wish, to show why the fine should not be imposed.

(over)

After the hearing is over, the hearing officer will compile the record (i.e. all of the information that was received at the hearing) and will make a recommendation to the Commissioner as to whether or not the fine should be imposed. The Commissioner will make a decision based on the evidence and testimony, and the decision issued by the Commissioner will specifically state the reasons for the decision.

The rules adopted by the Commissioner require the proposed fine to be reduced in certain circumstances, which are listed at Env-C 601.09. These include that you have not previously violated a law or rule implemented by DES, or that you acted in good faith. The Commissioner also has the discretion to allow you to pay a fine on a payment schedule, and/or to suspend all or a portion of the fine conditional upon remedying the underlying violation or staying in compliance with DES requirements for a specified period of time.

Sometimes people are concerned that the findings and rulings made by the Commissioner might be used against them in a separate proceeding (for instance, if their neighbor sues them for damages arising out of the same violation(s) for which they are being fined). In such a case, DES has accepted payment of the fine with a specific denial of liability. This is like pleading "no contest" to a traffic ticket: you pay the fine assessed, but are not admitting that you did anything wrong.

This fact sheet is intended as a basic source of information concerning DES administrative fines. It is not intended to replace the laws and rules regarding administrative fines, but merely to provide a summary of them.

For more information contact the DES Legal Unit, PO Box 95, Concord, NH 03302-0095, (603) 271-6072.